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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PETTER BRAGD,
SHABIRA ABBAS, and ANDREA SCHMID

Appeal 2009-012554
Application 09/651,127
Technology Center 3700

Before JENNIFER D. BAHR, STEFAN STAICOVICI, and
GAY ANN SPAHN, *Administrative Patent Judges*.

SPAHN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Petter Bragd et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-4, 6, 11, 12, and 15-18¹ under 35 U.S.C. § 103(a) as unpatentable over Graef (U.S. Patent No. 6,518,479 B1, issued Feb. 11, 2003) and Rezai (U.S. Patent No. 5,713,881, issued Feb. 3, 1998). Appellants cancelled claims 5, 7-10, 13 and 14. Appellants' counsel presented oral arguments on July 12, 2011. We have jurisdiction under 35 U.S.C. § 6(b). We REVERSE.

The Invention

The claims on appeal relate to an absorbent structure in an absorbent article. Claim 1, reproduced below, with emphasis added, is illustrative of the subject matter on appeal.

1. An absorbent structure in an absorbent article, the absorbent structure comprising a compressed foam material which expands upon wetting, the foam material comprises at least two integrated layers having different mean pore sizes, wherein the layers are formed by placing one on top of the other before they are dry so that *the layers partly penetrate into each other so that there is no clear partitioning line between the layers*, wherein the foam material is regenerated cellulose.

¹ Although the Examiner's ground of rejection on page 3 of the Answer lists claims 5 and 14 as being rejected under 35 U.S.C. § 103(a) as unpatentable over Graef and Rezai, our review of the record clearly indicates that claims 5 and 14 were cancelled by Appellants during prosecution of the application. See Amendment filed Nov. 25, 2005, at 5.

OPINION

Appellants contend that there is no disclosure or suggestion in either Graef or Rezai that the regenerated foam material described in Rezai could be formed in two layers that commingle with one another as is disclosed in Graef with regard to the fibrous layers. App. Br. 7. In other words, Appellants contend that while Graef discloses first and second fibrous layers that commingle with one another, Graef gives no indication that such commingling is applicable to foam layers. *Id.* Appellants also contend that this is particularly true since in Graef the foam of the initial foam/fiber mixture is actually removed during the formation of the web so that no foam is present in the final absorbent structure. *Id.*

The Examiner finds that Graef discloses the invention substantially as claimed, except that Graef fails to disclose regenerated cellulose. Ans. 3. The Examiner also finds that Rezai discloses the use of regenerated rayon cellulose foam, i.e., viscose, in an absorbent article, and the compression of the cellulose in order to provide a higher liquid wicking rate. *Id.* The Examiner concludes that it would have been obvious to one of ordinary skill in the art “to make the cellulose material of Graef compressed regenerated viscose cellulose, as taught by Rezai, to provide a higher liquid wicking rate.” *Id.* In response to Appellants’ argument that neither Graef nor Rezai suggest that the foam described in Rezai could be formed in two layers that are commingled with one another as disclosed in Graef with respect to the fibrous layers, the Examiner alleges that one of ordinary skill in the art would recognize that since the cellulosic foam of Rezai is made of fibers, the cellulosic foam could be substituted for the cellulosic fibrous material of

Graef with a reasonable expectation of success of forming the commingled layers. Ans. 4.

In response to the Examiner's suggestion that a person of ordinary skill in the art would have a reasonable expectation of success of commingling layers if the cellulosic foam of Rezai is substituted for the cellulosic fibrous material of Graef, Appellants contend that the Examiner's suggestion is based upon a misconception that Rezai's cellulosic foam is made of fibers, when in fact, Rezai's cellulosic foam or viscose is made from fibers that are allowed to swell in sodium hydroxide and then completely dissolved upon the addition of carbon disulfide. Reply Br. 4-5. Thus, Appellants contend that since Rezai's foam is not fibrous, there is no basis for the Examiner's allegation of a reasonable expectation of success for forming the commingled fibrous layers of Graef using Rezai's foam, nor would the result of the substitution of Rezai's cellulosic foam for Graef's cellulosic fibrous material be predictable. Reply Br. 5.

We agree with Appellants that the combination of Graef and Rezai fails to render the claims obvious. Neither Graef nor Rezai offers any teaching as to whether commingling of the layers would still occur upon the substitution of the cellulosic foam of Rezai for the cellulosic fibrous material of Graef. Absent any evidence that foam layers would commingle in the same way that the fibrous layers of Graef commingle, it is speculative at best that the combination of Graef and Rezai would meet the claim limitation of layers that partly penetrate into each other so that there is no clear partitioning line between the layers. Since the Examiner has failed to establish by a preponderance of the evidence that commingling of the layers would still take place upon the substitution of the cellulosic foam of Rezai

for the cellulosic fibrous material of Graef, we cannot sustain the Examiner's rejection of claims 1-4, 6, 11, 12, and 15-18 under 35 U.S.C. § 103(a) as unpatentable over Graef and Rezai.

DECISION

We reverse the Examiner's rejection of claims 1-4, 6, 11, 12, and 15-18 under 35 U.S.C. § 103(a) as unpatentable over Graef and Rezai.

REVERSED

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